



DECISION NOTICE OF SHERIFF NIGEL ROSS

in the case of

JESUS RODRIGUEZ ORTEGA, 48/1 Drum Street, Edinburgh, EH17 8RN per Community Help and Advice Initiative, Riverside House, 502 Gorgie Road, Edinburgh, EH11 3AF

Appellant

and

CESAR FELIPE DOMINGUEZ LOPEZ, 77/6 Calder Gardens, Edinburgh, EH11 4LF

Respondent

FTT Case Reference FTS/HPC/EV/19/0967

7 October 2019

Decision in relation to leave to appeal (Rule 3(6) of The Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016)

The tribunal refuses leave to appeal for the reasons given below.

Note

[1] The First-tier Tribunal (“FtT”) issued a decision on 24 July 2019 granting an eviction order in terms of section 51 of the Private Housing (Tenancies) (Scotland) Act 2016. The appellant requested leave of the FtT to appeal that decision. By decision dated 23 August 2019 leave was refused. The FtT provided written reasons for both decisions.

[2] The appellant seeks leave of this tribunal to appeal the decision of 24 July 2019.

Having considered the written decisions, the appellant's written representations and supporting documents, leave is refused in relation to each of the grounds of appeal.

Ground 1 – failure to adequately consider the suitability of the subjects for the applicant's use

[3] The appellant submits that the respondent, who has a wife and young daughter, could not live in the subjects without it becoming statutorily overcrowded, as defined in the Housing (Scotland) Act 1987. That Act is not relevant for present purposes, and is a reference point only.

[4] The appellant claims the FtT failed to have regard to suitability. There was, however, no requirement specifically to consider suitability. The only issue is the credibility and reliability of the respondent's claim to have formed the intention to live there.

[5] In circumstances where the respondent's unchallenged evidence was that the family did indeed live there prior to June 2018, and did so comfortably, the FtT cannot be faulted for regarding suitability as established. The 1987 Act definition is irrelevant for that purpose.

[6] This ground of appeal is not arguable.

Ground 2 – no adequate reasons for finding intention established

[7] The FtT required to consider what evidence they accepted or rejected. The 2016 Act, Schedule 3, Part 1, rule 4(4) envisages that a simple affidavit will be sufficient evidential basis upon which a tribunal can find such an intention established. They had the direct evidence of the respondent on that point. The FtT discuss the respondent's reasons for

wishing to return, namely not feeling safe in their new house, time-consuming commuting, and confrontation with local youths.

[8] The FtT considered and applied the correct test. They considered the foregoing reasons, and the informed reader would be in no doubt that the FtT accepted those reasons, which are in themselves logical. No error in their assessment of the evidence is evident. They accepted, as they were entitled, that the respondent's change of address had not worked, and the respondent wished to move back to the property.

[9] There is no material to show that the FtT erred in exercising their fact-finding function. This ground is not arguable.

Ground 3 – error in not hearing evidence

[10] The FtT proceedings are not inquisitorial, and there is no duty on the FtT to investigate information which is not placed before them. If either party required to rely on telephone messages, it was their responsibility to lead that evidence. It is not stated what those messages would have revealed, or how it would have affected the FtT's view of the evidence of intention. The fact that the parties were in an unrelated dispute is not, by itself, an indication of intention to move back to the property. There are no evident grounds on which to disturb the FtT's conclusions.

[11] This ground is not arguable.

Ground 4 – undue reliance on respondent's evidence; failure to take other evidence into account

[12] This ground proceeds on a misrepresentation. The statement "The Tribunal accepted that the Applicant's mere statement of his intention to return to live in the let subjects was

sufficient to evidence the same” is flatly contradicted by the FtT’s statement that “The Tribunal accepted that more than a mere statement of intention to live in the Property was required and that it accepted that the intention must be genuine, firm and settled.” (see “Reasons for Decision”).

[13] The ground proceeds to refer to two pieces of evidence without placing these in context. It is not clear whether the statement in (b) was before the FtT, if it was part of the unrepresented telephone message, but even if it were, it is a correct statement, provided it is based on a genuine, firm and settled intention to return to the property. The FtT is not bound to take any particular approach to the evidence, and it was for the respondent’s representative to seek to challenge this information.

[14] The FtT did not “accept evidence that the Applicant had threatened to evict the Respondent for reason of being annoyed by him”. While they may have heard such a claim, it does not form part of the Reasons for Decision.

[15] There is insufficient material to conclude that the FtT failed or erred in its assessment of the evidence. The reasons given show it applied the correct test and assessed the evidence against that test. No error is evident or suggests itself. There is no material which would allow this tribunal to take a different view.

[16] This ground is not arguable.

[17] For all these reasons, leave to appeal is refused.

[18] There is a provision to request a review. Please note that any review will apply the same principles, and mere disagreement with the FtT’s assessment of the evidence will not be sufficient to successfully review this decision. It is necessary to demonstrate that the FtT erred in law, or reached a decision that no reasonable tribunal could have done in the face of the evidence presented by parties. No such material is presented.